

In re: WALLACE BRANDON, JERRY W. GRAVES, AND KATHY GRAVES.
HPA Docket No. 98-0011.
Decision and Order as to Jerry W. Graves and Kathy Graves.
Filed July 19, 2001.

Horse protection – Entry – Exhibit – Allowing entry and exhibition – Admissibility of evidence – Baird test – Burton test – Credibility determinations – Civil penalty – Disqualification.

The Judicial Officer (JO) affirmed the decision by Chief Administrative Law Judge James W. Hunt (Chief ALJ): (1) concluding that Jerry W. Graves allowed the entry and exhibition of a horse at a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D); (2) concluding that Kathy Graves allowed the entry of and exhibited a horse at a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(A) and (D); (3) assessing Jerry W. Graves and Kathy Graves (Respondents) a civil penalty of \$2,000 each; and (4) disqualifying Respondents for 1 year from exhibiting, showing, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. The JO rejected Respondents' contention that Complainant's Exhibit 8 (CX 8), an excerpt from the *Walking Horse Report*, was not the sort of evidence upon which responsible persons are accustomed to rely. The JO also rejected Respondents' contention that, under the tests adopted in *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982), and *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994), the Chief ALJ erroneously concluded that they allowed the entry and exhibition of a horse at a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D). The JO stated that Respondents did not meet the three-pronged test in *Burton* because Respondents' testimony that they directed the trainer not to sore their horse was contradicted by Respondents' affidavits. Further, the JO agreed with the Chief ALJ's conclusion that Respondents' testimony that they instructed the trainer not to sore their horse was not credible. The JO stated that Respondents did not meet the "affirmative steps" test in *Baird* because Respondents' failed to introduce credible evidence that they took an affirmative step to prevent the soring of their horse. Finally, the JO rejected Respondents' contention that the Chief ALJ's credibility determinations were error. The JO stated that, while he is not bound by an administrative law judge's credibility determinations, he gives great weight to the credibility determinations of administrative law judges because they have the opportunity to see and hear the witnesses testify. The JO found that the record supported the Chief ALJ's credibility determinations.

Colleen A. Carroll, for Complainant.
Brenda S. Bramlett, for Respondents.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on July 9, 1998. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the Horse Protection Regulations (9 C.F.R. pt. 11); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice].

Complainant alleges that: (1) on August 28, 1997, Wallace Brandon entered for the purpose of showing or exhibiting and exhibited a horse known as “Gold’s Red Skipper” as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold’s Red Skipper was sore, in violation of section 5(2)(A) and (B) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (B)); (2) on August 28, 1997, Wallace Brandon, or his agents or employees, removed Gold’s Red Skipper from the inspection area at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, before the inspections of Gold’s Red Skipper were completed and before Gold’s Red Skipper was released from inspection by an Animal and Plant Health Inspection Service representative, thereby impeding the ability of the Animal and Plant Health Inspection Service and show management to inspect Gold’s Red Skipper, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(b) of the Horse Protection Regulations (9 C.F.R. § 11.4(b)); (3) on August 28, 1997, Jerry W. Graves entered and allowed the entry and exhibition of Gold’s Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold’s Red Skipper was sore, in violation of section 5(2)(A) and (D) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (D)); and (4) on August 28, 1997, Kathy Graves entered, exhibited, and allowed the entry of Gold’s Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold’s Red Skipper was sore, in violation of section 5(2)(A) and (D) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (D)) (Compl. ¶ II).

On October 23, 1998, Wallace Brandon, Jerry W. Graves, and Kathy Graves [hereinafter Respondents] filed Answer of Respondents [hereinafter Answer] denying the material allegations in the Complaint.

Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided at a hearing in Murfreesboro, Tennessee, on February 23, 2000. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Brenda S. Bramlett, Bramlett & Durard, Shelbyville, Tennessee, represented Respondents.

On August 21, 2000, Complainant filed Complainant’s Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof. On October 23, 2000, Respondents filed Respondents’ Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof [hereinafter Respondents’ Post-Hearing Brief].

On December 11, 2000, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that on August 28, 1997, Wallace Brandon entered for the purpose of showing or exhibiting and exhibited Gold’s Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while

Gold's Red Skipper was sore, in violation of section 5(2)(A) and (B) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (B)); (2) concluded that on August 28, 1997, Jerry W. Graves allowed the entry and exhibition of Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)); (3) concluded that on August 28, 1997, Kathy Graves allowed the entry of and exhibited Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(A) and (D) of the Horse Protection Act (15 U.S.C. § 1824(2)(A), (D)); (4) assessed each Respondent a \$2,000 civil penalty; and (5) disqualified each Respondent for 1 year from exhibiting, showing, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (Initial Decision and Order at 11-12).

On April 23, 2001, Jerry W. Graves and Kathy Graves appealed to the Judicial Officer. On July 6, 2001, Complainant filed Complainant's Response to Respondents' Appeal Petition. On July 11, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision as to Jerry W. Graves and Kathy Graves.¹

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with only minor modifications, the Chief ALJ's Initial Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Initial Decision and Order as restated.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

¹The Hearing Clerk served Wallace Brandon with the Initial Decision and Order on December 18, 2000 (Domestic Return Receipt for Article Number P093175318). Wallace Brandon did not appeal the Initial Decision and Order within 30 days after being served with the Initial Decision and Order. Therefore, in accordance with the Initial Decision and Order and the Rules of Practice, the Initial Decision and Order became final and effective as to Wallace Brandon on January 22, 2001 (Initial Decision and Order at 12; 7 C.F.R. § 1.142(c)(4)).

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term “sore” when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1822. Congressional statement of findings

The Congress finds and declares that—

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to

prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1823. Horse shows and exhibitions

(a) Disqualification of horses

The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

. . . .

(c) Appointment of inspectors; manner of inspections

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

....
(9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

§ 1825. Violations and penalties

....

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

....

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this

section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than \$3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than \$3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

. . . .

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1823(a), (c), 1824(2), (9), 1825(b)(1)-(2), (c), (d)(5), 1828.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

**CHAPTER I—ANIMAL AND PLANT HEALTH
INSPECTION SERVICE,
DEPARTMENT OF AGRICULTURE**

SUBCHAPTER A—ANIMAL WELFARE

. . . .

PART 11—HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected in a standard dictionary, such as “Webster’s.”

. . . .

Designated Qualified Person or *DQP* means a person meeting the requirements specified in § 11.7 of this part who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

§ 11.4 Inspection and detention of horses.

For the purpose of effective enforcement of the Act:

. . . .

(b) When any APHIS representative notifies the owner, exhibitor, trainer, or other person having custody of or responsibility for a horse at any horse show, horse exhibition, or horse sale or auction that APHIS desires to inspect such horse, it shall not be moved from the horse show, horse exhibition, or horse sale or auction until such inspection has been completed and the horse has been released by an APHIS representative.

§ 11.7 Certification and licensing of designated qualified persons (DQP’s).

(a) *Basic qualifications of DQP applicants.* DQP's holding a valid, current DQP license issued in accordance with this part may be appointed by the management of any horse show, horse exhibition, horse sale, or horse auction, as qualified persons in accordance with section 4(c) of the Act, to inspect horses to detect or diagnose soring and to otherwise inspect horses, or any records pertaining to any horse for the purpose of enforcing the Act. Individuals who may be licensed as DQP's under this part shall be:

(1) Doctors of Veterinary Medicine who are accredited in any State by the United States Department of Agriculture under part 161 of chapter I, title 9 of the Code of Federal Regulations, and who are:

- (i) Members of the American Association of Equine Practitioners, or
- (ii) Large animal practitioners with substantial equine experience, or
- (iii) Knowledgeable in the area of equine lameness as related to soring and soring practices (such as Doctors of Veterinary Medicine with a small animal practice who own, train, judge, or show horses, or Doctors of Veterinary Medicine who teach equine related subjects in an accredited college or school of veterinary medicine). Accredited Doctors of Veterinary Medicine who meet these criteria may be licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department under this part without undergoing the formal training requirements set forth in this section.

(2) Farriers, horse trainers, and other knowledgeable horsemen whose past experience and training would qualify them for positions as horse industry organization or association stewards or judges (or their equivalent) and who have been formally trained and licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department in accordance with this section.

(b) *Certification requirements for DQP programs.* The Department will not license DQP's on an individual basis. Licensing of DQP's will be accomplished only through DQP programs certified by the Department and initiated and maintained by horse industry organizations or associations. Any horse industry organization or association desiring Department certification to train and license DQP's under the Act shall submit to the Administrator a formal request in writing for certification of its DQP program and a detailed outline of such program for Department approval. Such outline shall include the organizational structure of such organization or association and the names of the officers or persons charged with the management of the organization or association. The outline shall also contain at least the following:

(1) The criteria to be used in selecting DQP candidates and the minimum qualifications and knowledge regarding horses each candidate must have in order to be admitted to the program.

(2) A copy of the formal training program, classroom and practical, required to be completed by each DQP candidate before being licensed by such horse industry organization or association, including the minimum number of hours, classroom and practical, and the subject matter of the training program. Such training program must meet the following minimum standards in order to be certified by the Department under the Act.

(i) Two hours of classroom instruction on the anatomy and physiology of the limbs of a horse. The instructor teaching the course must be specified, and a resume of said instructor's background, experience, and qualifications to teach such course shall be provided to the Administrator.

(ii) Two hours of classroom instruction on the Horse Protection Act and regulations and their interpretation. Instructors for this course must be furnished or recommended by the Department. Requests for instructors to be furnished or recommended must be made to the Administrator in writing at least 30 days prior to such course.

(iii) Four hours of classroom instruction on the history of soring, the physical examination procedures necessary to detect soring, the detection and diagnosis of soring, and related subjects. The instructor teaching the course must be specified and a summary of said instructor's background, experience, and qualifications to teach such course must be provided to the Administrator.

(iv) Four hours of practical instruction in clinics and seminars utilizing live horses with actual application of the knowledge gained in the classroom subjects covered in paragraphs (b)(2)(i), (ii), and (iii) of this section. Methods and procedures required to perform a thorough and uniform examination of a horse shall be included. The names of the instructors and a resume of their background, academic and practical experience, and qualifications to present such instruction shall be provided to the Administrator. Notification of the actual date, time, duration, subject matter, and geographic location of such clinics or seminars must be sent to the Administrator at least 10 days prior to each such clinic or seminar.

(v) One hour of classroom instruction regarding the DQP standards of conduct promulgated by the licensing organization or association pursuant to paragraph (d)(7) of this section.

(vi) One hour of classroom instruction on recordkeeping and reporting requirements and procedures.

(3) A sample of a written examination which must be passed by DQP candidates for successful completion of the program along with sample answers and the scoring thereof, and proposed passing and failing standards.

(4) The criteria to be used to determine the qualifications and performance abilities of DQP candidates selected for the training program and the criteria used to indicate successful completion of the training

program, in addition to the written examination required in paragraph (b)(3) of this section.

(5) The criteria and schedule for a continuing education program and the criteria and methods of monitoring and appraising performance for continued licensing of DQP's by such organization or association. A continuing education program for DQP's shall consist of not less than 4 hours of instruction per year.

(6) Procedures for monitoring horses in the unloading, preparation, warmup, and barn areas, or other such areas. Such monitoring may include any horse that is stabled, loaded on a trailer, being prepared for show, exhibition, sale, or auction, or exercised, or that is otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or auction.

(7) The methods to be used to insure uniform interpretation and enforcement of the Horse Protection Act and regulations by DQP's and uniform procedures for inspecting horses for compliance with the Act and regulations;

(8) Standards of conduct for DQP's promulgated by the organization or association in accordance with paragraph (d)(7) of this section; and

(9) A formal request for Department certification of the DQP program.

The horse industry organizations or associations that have formally requested Department certification of their DQP training, enforcement, and maintenance program will receive a formal notice of certification from the Department, or the reasons, in writing, why certification of such program cannot be approved. A current list of certified DQP programs and licensed DQP's will be published in the FEDERAL REGISTER at least once each year, and as may be further required for the purpose of deleting programs and names of DQP's that are no longer certified or licensed, and of adding the names of programs and DQP's that have been certified or licensed subsequent to the publication of the previous list.

(c) *Licensing of DQP's*. Each horse industry organization or association receiving Department certification for the training and licensing of DQP's under the Act shall:

(1) Issue each DQP licensed by such horse industry organization or association a numbered identification card bearing the name and personal signature of the DQP, a picture of the DQP, and the name and address, including the street address or post office box and zip code, of the licensing organization or association;

(2) Submit a list to the Administrator of names and addresses including street address or post office box and zip code, of all DQP's that have successfully completed the certified DQP program and have been licensed under the Act and regulations by such horse industry organization or

association;

(3) Notify the Department of any additions or deletions of names of licensed DQP's from the licensed DQP list submitted to the Department or of any change in the address of any licensed DQP or any warnings and license revocations issued to any DQP licensed by such horse industry organization or association within 10 days of such change;

(4) Not license any person as a DQP if such person has been convicted of any violation of the Act or regulations occurring after July 13, 1976, or paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976, for a period of at least 2 years following the first such violation, and for a period of at least 5 years following the second such violation and any subsequent violation;

(5) Not license any person as a DQP until such person has attended and worked two recognized or affiliated horse shows, horse exhibitions, horse sales, or horse auctions as an apprentice DQP and has demonstrated the ability, qualifications, knowledge and integrity required to satisfactorily execute the duties and responsibilities of a DQP;

(6) Not license any person as a DQP if such person has been disqualified by the Secretary from making detection, diagnosis, or inspection for the purpose of enforcing the Act, or if such person's DQP license is canceled by another horse industry organization or association.

(d) *Requirements to be met by DQP's and Licensing Organizations or Associations.* (1) Any licensed DQP appointed by the management of any horse show, horse exhibition, horse sale or auction to inspect horses for the purpose of detecting and determining or diagnosing horses which are sore and to otherwise inspect horses for the purpose of enforcing the Act and regulations, shall keep and maintain the following information and records concerning any horse which said DQP recommends be disqualified or excused for any reason at such horse show, horse exhibition, horse sale or auction, from being shown, exhibited, sold or auctioned, in a uniform format required by the horse industry organization or association that has licensed said DQP:

(i) The name and address, including street address or post office box and zip code, of the show and the show manager.

(ii) The name and address, including street address or post office box and zip code, of the horse owner.

(iii) The name and address, including street address or post office box and zip code, of the horse trainer.

(iv) The name and address, including street address or post office box and zip code, of the horse exhibitor.

(v) The exhibitors number and class number, or the sale or auction tag

number of said horse.

(vi) The date and time of the inspection.

(vii) A detailed description of all of the DQP's findings and the nature of the alleged violation, or other reason for disqualifying or excusing the horse, including said DQP's statement regarding the evidence or facts upon which the decision to disqualify or excuse said horse was based.

(viii) The name, age, sex, color, and markings of the horse; and

(ix) The name or names of the show manager or other management representative notified by the DQP that such horse should be excused or disqualified and whether or not such manager or management representative excused or disqualified such horse.

Copies of the above records shall be submitted by the involved DQP to the horse industry organization or association that has licensed said DQP within 72 hours after the horse show, horse exhibition, horse sale, or horse auction is over.

(2) The DQP shall inform the custodian of each horse allegedly found in violation of the Act or its regulations, or disqualified or excused for any other reason, of such action and the specific reasons for such action.

(3) Each horse industry organization or association having a Department certified DQP program shall submit a report to the Department containing the following information, from records required in paragraph (d)(1) of this section and other available sources, to the Department on a monthly basis:

(i) The identity of all horse shows, horse exhibitions, horse sales, or horse auctions that have retained the services of DQP's licensed by said organization or association during the month covered by the report. Information concerning the identity of such horse shows, horse exhibitions, horse sales, or horse auctions shall include:

(A) The name and location of the show, exhibition, sale, or auction.

(B) The name and address of the manager.

(C) The date or dates of the show, exhibition, sale, or auction.

(ii) The identity of all horses at each horse show, horse exhibition, horse sale, or horse auction that the licensed DQP recommended be disqualified or excused for any reason. The information concerning the identity of such horses shall include:

(A) The registered name of each horse.

(B) The name and address of the owner, trainer, exhibitor, or other person having custody of or responsibility for the care of each such horse disqualified or excused.

(4) Each horse industry organization or association having a Department certified DQP program shall provide, by certified mail if personal service is not possible, to the trainer and owner of each horse allegedly found in violation of the Act or its regulations or otherwise disqualified or excused

for any reason, the following information;

- (i) The name and date of the show, exhibition, sale, or auction.
- (ii) The name of the horse and the reason why said horse was excused, disqualified, or alleged to be in violation of the Act or its regulations.

(5) Each horse industry organization or association having a Department certified DQP program shall provide each of its licensed DQP's with a current list of all persons that have been disqualified by order of the Secretary from showing or exhibiting any horse, or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Department will make such list available, on a current basis, to organizations and associations maintaining a certified DQP program.

(6) Each horse industry organization or association having a Department certified DQP program shall develop and provide a continuing education program for licensed DQP's which provides not less than 4 hours of instruction per year to each licensed DQP.

(7) Each horse industry organization or association having a Department certified DQP program shall promulgate standards of conduct for its DQP's, and shall provide administrative procedures within the organization or association for initiating, maintaining, and enforcing such standards. The procedures shall include the causes for and methods to be utilized for canceling the license of any DQP who fails to properly and adequately carry out his duties. Minimum standards of conduct for DQP's shall include the following;

- (i) A DQP shall not exhibit any horse at any horse show or horse exhibition, or sell, auction, or purchase any horse sold at a horse sale or horse auction at which he or she has been appointed to inspect horses;

- (ii) A DQP shall not inspect horses at any horse show, horse exhibition, horse sale or horse auction in which a horse or horses owned by a member of the DQP's immediate family or the DQP's employer are competing or are being offered for sale;

- (iii) A DQP shall follow the uniform inspection procedures of his certified organization or association when inspecting horses; and

- (iv) The DQP shall immediately inform management of each case regarding any horse which, in his opinion, is in violation of the Act or regulations.

(e) *Prohibition of appointment of certain persons to perform duties under the Act.* The management of any horse show, horse exhibition, horse sale, or horse auction shall not appoint any person to detect and diagnose horses which are sore or to otherwise inspect horses for the purpose of enforcing the Act, if that person:

- (1) Does not hold a valid, current DQP license issued by a horse industry organization or association having a DQP program certified by the

Department.

(2) Has had his DQP license canceled by the licensing organization or association.

(3) Is disqualified by the Secretary from performing diagnosis, detection, and inspection under the Act, after notice and opportunity for a hearing, when the Secretary finds that such person is unfit to perform such diagnosis, detection, or inspection because he has failed to perform his duties in accordance with the Act or regulations, or because he has been convicted of a violation of any provision of the Act or regulations occurring after July 13, 1976, or has paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976.

(f) *Cancellation of DQP license.* (1) Each horse industry organization or association having a DQP program certified by the Department shall issue a written warning to any DQP whom it has licensed who violates the rules, regulations, by-laws, or standards of conduct promulgated by such horse industry organization or association pursuant to this section, who fails to follow the procedures set forth in § 11.21 of this part, or who otherwise carries out his duties and responsibilities in a less than satisfactory manner, and shall cancel the license of any DQP after a second violation. Upon cancellation of his DQP license, the DQP may, within 30 days thereafter, request a hearing before a review committee of not less than three persons appointed by the licensing horse industry organization or association. If the review committee sustains the cancellation of the license, the DQP may appeal the decision of such committee to the Administrator within 30 days from the date of such decision, and the Administrator shall make a final determination in the matter. If the Administrator finds, after providing the DQP whose license has been canceled with a notice and an opportunity for a hearing, that there is sufficient cause for the committee's determination regarding license cancellation, he shall issue a decision sustaining such determination. If he does not find that there was sufficient cause to cancel the license, the licensing organization or association shall reinstate the license.

(2) Each horse industry organization or association having a Department certified DQP program shall cancel the license of any DQP licensed under its program who has been convicted of any violation of the Act or regulations or of any DQP who has paid a fine or civil penalty in settlement of any alleged violation of the Act or regulations if such alleged violation occurred after July 13, 1976.

(g) *Revocation of DQP program certification of horse industry organizations or associations.* Any horse industry organization or association having a Department certified DQP program that has not

received Department approval of the inspection procedures provided for in paragraph (b)(6) of this section, or that otherwise fails to comply with the requirements contained in this section, may have such certification of its DQP program revoked, unless, upon written notification from the Department of such failure to comply with the requirements in this section, such organization or association takes immediate action to rectify such failure and takes appropriate steps to prevent a recurrence of such noncompliance within the time period specified in the Department notification, or otherwise adequately explains such failure to comply to the satisfaction of the Department. Any horse industry organization or association whose DQP program certification has been revoked may appeal such revocation to the Administrator in writing within 30 days after the date of such revocation and, if requested, shall be afforded an opportunity for a hearing. All DQP licenses issued by a horse industry organization or association whose DQP program certification has been revoked shall expire 30 days after the date of such revocation, or 15 days after the date the revocation becomes final after appeal, unless they are transferred to a horse industry organization or association having a program currently certified by the Department.

9 C.F.R. §§ 11.1, .4(b), .7 (1998) (footnotes omitted).

**CHIEF ADMINISTRATIVE LAW JUDGE'S
INITIAL DECISION AND ORDER
(AS RESTATED)**

Statement of the Case

Respondents Jerry W. Graves and Kathy Graves, whose address is 1220 Paul Rescer Road, Moss, Tennessee 38575, own between 35 and 40 Tennessee Walking Horses. They employ professional trainers to train the horses. (Answer ¶ I(B), (C); Tr. 87-88, 142.) In 1994, the Graves acquired a horse known as "Gold's Red Skipper." Gold's Red Skipper was a flatshod horse that was "hard to work with." Based on the recommendation of one of their trainers, Ramsey Bullington, the Graves, in February 1997, asked Wallace Brandon to train Gold's Red Skipper. (Tr. 89, 117-18; CX 12, CX 13.) Wallace Brandon is a horse trainer whose mailing address is 4676 Murfreesboro Road, Franklin, Tennessee 37067 (Answer ¶ I(B); CX 10).

The Graves were unaware that Wallace Brandon, who was paid by the Graves to train Gold's Red Skipper, had been involved in a "prior case" about 12 years ago (Tr. 92, 126-27; CX 10). Jerry W. Graves and Kathy Graves each gave statements on January 21, 1998, to Animal and Plant Health Inspection Service investigator

Michael Nottingham that they had not given Wallace Brandon “any instructions on the training of Gold’s Red Skipper.” (CX 12 at 2, CX 13 at 2.) According to Jerry W. Graves, “if you go start telling [trainers] what to do, they’ll tell you to take [the horse] home.” (Tr. 149.) However, both Jerry W. Graves and Kathy Graves testified at the hearing that they told Wallace Brandon not to sore Gold’s Red Skipper and that they would “move” Gold’s Red Skipper if he sored him (Tr. 91-92, 108, 146, 148, 164-65). Gold’s Red Skipper was kept at Wallace Brandon’s barn where he was periodically seen by veterinarians. Kathy Graves also frequently visited Gold’s Red Skipper to ride him. (Tr. 89-90, 109.)

Later, in 1997, Wallace Brandon asked the Graves if they wanted to have Gold’s Red Skipper entered in the 59th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee. They agreed. Wallace Brandon entered Gold’s Red Skipper as entry number 904 in class number 126, and the owners were listed as “The Jerry Graves Family.” The Graves reimbursed Wallace Brandon for the entry fee. Wallace Brandon transported Gold’s Red Skipper to the Tennessee Walking Horse National Celebration. (Tr. 110, 151; CX 2, CX 3, CX 4, CX 10, CX 12, CX 13.)

Before his exhibition at the Tennessee Walking Horse National Celebration on August 28, 1997, Gold’s Red Skipper was given a pre-show inspection by the show’s Designated Qualified Person.² Gold’s Red Skipper passed the pre-show inspection, and Kathy Graves rode Gold’s Red Skipper during the exhibition. Gold’s Red Skipper placed third in his class, and a ribbon and a \$500 prize were awarded for his third place finish. (Tr. 97-99, 112; CX 9 at 1, CX 14.)

After Gold’s Red Skipper’s exhibition, Animal and Plant Health Inspection Service doctor of veterinary medicine, John Michael Guedron, an experienced examiner of walking horses, inspected Gold’s Red Skipper. Dr. Guedron observed Gold’s Red Skipper’s movements and then palpated the horse’s forelegs. Dr. Guedron testified that he prepared a report of his examination that day (APHIS FORM 7077) and prepared an affidavit the following day. (Tr. 59-78; CX 5, CX 9.) In his affidavit, Dr. Guedron stated:

I was assigned to work the 59th Annual Tennessee Walking Horse National Celebration held at the Calsonic Arena in Shelbyville, TN on August 27-30, 1997. Other USDA, APHIS personnel working the show or in attendance were: Dr. Scott Price, VMO-KY; Dr. David Smith, VMO-NY; Dr. Bob Willems, SACS-MD; Mr. Jimmy Odle, I&ES Investigator-TN; and Mr. Mike Nottingham, I&ES Investigator-TN. DQP’s from the National Horse Show Commission working at the show included:

²A Designated Qualified Person is an individual appointed by the management of a horse show and trained under a United States Department of Agriculture-sponsored program to inspect horses for compliance with the Horse Protection Act (15 U.S.C. § 1823; 9 C.F.R. §§ 11.1, .7).

Charles Thomas; William Edwards; Iry Gladney; Harry Chaffin; Joe Cunningham; and Earl Melton. Also present was Mr. Lonnie Messick, DQP Supervisor for the NHSC.

I first saw Entry #904 in Class #126 a sorrel gelding later identified as "Gold's Red Skipper" as it was presented to me for post-show inspection (it tied 3rd place). This was at approximately 10:00 pm CDT. As the custodian was leading the horse I noted that it was walking slowly with a shortened, choppy gait and its weight shifted to its rear feet. It also had difficulty turning around the cone. I began my physical exam on the left leg and foot and elicited severe, consistent and repeatable pain responses to digital palpation of several spots on the anterior and antero-lateral aspects of the pastern, approximately 1 - 2 inches above the coronary band. These were evidenced by strong withdrawal of the horse's foot, rearing of its head, and tightening of its abdominal muscles. I continued with the right leg and foot and elicited moderate, consistent and repeatable pain responses, as evidenced by withdrawal of its foot, in a diffuse pattern along the anterior pastern just above the coronary band.

I then asked DQP Earl Melton to examine the horse and noted that the horse appeared to be having even more difficulty in walking and turning around the cone. I observed as the DQP elicited the same consistent and repeatable pain responses as I had, to digital palpation of both front pasterns. He scored the horse as abnormal on locomotion and physical exam for a total score of 7 which disqualified it from showing. As the DQP was writing the ticket, the horse was taken back to its stall on the show grounds. It was at this time that DQP Supervisor Lonnie Messick decided that they needed to have another DQP inspect the horse and agree with the findings of the first. The trainer left to retrieve the horse, but was gone for an unreasonable length of time. Finally, Mr. Messick sent (2) DQP's to bring the horse back and when they returned, they reported witnessing grooms rubbing on the horse's front pasterns. At this time, the horse was moving more freely and even though the 2nd DQP (Charles Thomas) elicited consistent and repeatable pain responses, he could not concur with the decision of the 1st DQP, and only gave it a total score of 6, a one (1) for general appearance, two (2) for locomotion, and three (3) for physical exam, which disqualified the horse, but carries a lesser penalty.

I then conferred with Drs. Price and Willems and we all agreed that since we had lost chain of custody of the horse for such a long time, the 2nd DQP inspection was invalid, as would be any subsequent exam by another VMO. We also agreed that the horse was Sore as defined by the Horse Protection

Act and that USDA, APHIS would initiate a Federal case based on my examination alone. I then informed the trainer of our decision. Mr. Jimmy Odle and I filled out the 7077.

CX 9.

Dr. Guedron testified that, based on his examination, Gold's Red Skipper would have experienced pain when he was exhibited (Tr. 78-79). Designated Qualified Person Earl Melton issued a ticket to Wallace Brandon for Gold's Red Skipper's "bilateral sensitivity, locomotion and scurffing." (CX 7 at 3.) The National Horse Show Commission, Inc., notified Wallace Brandon on November 12 and 14, 1997, that, based on the Designated Qualified Person ticket issued on August 28, 1997, the ribbon and money awarded for Gold's Red Skipper's third place finish had to be returned, that Wallace Brandon was fined \$500, and that Wallace Brandon was suspended from showing horses from March 1, 1998, through June 12, 1998 (CX 14).

Neither Jerry W. Graves nor Kathy Graves was present for the pre-show or the post-show inspection of Gold's Red Skipper. In his statement to Michael Nottingham on January 21, 1998, Jerry W. Graves stated that he believed the reason that Gold's Red Skipper was found to be sore at the Tennessee Walking Horse National Celebration was because Gold's Red Skipper was "silly" about his feet and had to stand around for 30 to 45 minutes before being examined (CX 12 at 2). Kathy Graves said in her statement that Wallace Brandon had told her that Gold's Red Skipper had to stand around for 30 to 45 minutes after the exhibition and that Wallace Brandon "told me that he had a little problem with Skipper and had to go before the board. He called me later and said he had worked it out." (CX 13 at 2.) However, at the hearing, Kathy Graves testified that she did not know that Gold's Red Skipper was sore when he was entered and exhibited and that she knew nothing about Gold's Red Skipper being "wrote up" at the Tennessee Walking Horse National Celebration until Animal and Plant Health Inspection Service investigator Michael Nottingham took her statement on January 21, 1998. She said she tried to call Wallace Brandon at that time but was unable to reach him. (Tr. 94.) Jerry W. Graves likewise testified that he was not aware that Gold's Red Skipper was found sore at the Tennessee Walking Horse National Celebration until January 21, 1998 (Tr. 162).

Kathy Graves testified that Gold's Red Skipper was sold in March 1998 (Tr. 121). However, the *Walking Horse Report*, a trade publication, reported in July 1999 that on June 12, 1998, Wallace Brandon entered Gold's Red Skipper at the Crossroads of Dixie Horse Show for the "Jerry Graves Family" (Tr. 170-83; CX 8). Kathy Graves testified that she did not know and did not remember anything about Gold's Red Skipper being exhibited on June 12, 1998 (Tr. 122-24).

Jerry W. Graves and Kathy Graves deny Gold's Red Skipper was sore when he

was entered and exhibited on August 28, 1997, and contend the Horse Protection Act is unconstitutional (Answer). Jerry W. Graves and Kathy Graves further contend the evidence does not show that they allowed the entry or exhibition of Gold's Red Skipper under the standard adopted in *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994) (Respondents' Post-Hearing Brief at 4-10).

Discussion

The Horse Protection Act is constitutional. *In re William J. Reinhart*, 59 Agric. Dec. 721, 735, 763-64 (2000).

Dr. Guedron found, on examining Gold's Red Skipper on August 28, 1997, that the horse demonstrated consistent and repeatable pain responses when both front pasterns were palpated. Dr. Guerdon concluded that Gold's Red Skipper was sore and would have experienced pain when exhibited. (Tr. 66-83; CX 5, CX 9.) Designated Qualified Person Earl Melton elicited similar reactions when he examined Gold's Red Skipper (CX 7, CX 9 at 2). Designated Qualified Person Charles Thomas found a pain response but less than that found by Dr. Guedron and Designated Qualified Person Earl Melton. However, Designated Qualified Person Charles Thomas' inspection took place after Gold's Red Skipper had been returned to his stall and his pasterns had been rubbed. (CX 9 at 2, CX 11.) Thus, substantial evidence shows that Gold's Red Skipper suffered bilateral pain -- abnormal sensitivity -- in both front legs. This circumstance raises the presumption that Gold's Red Skipper was sore. 15 U.S.C. § 1825(d)(5). The only rebuttal was the pre-show Designated Qualified Person examination. Although the Designated Qualified Person who conducted this examination did not disqualify Gold's Red Skipper, a horse may be found sore at one examination and not sore at another. *In re Jackie McConnell*, 44 Agric. Dec. 712, 722 (1985), *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (1992). Therefore, the preponderance of the evidence shows that Gold's Red Skipper was sore when exhibited. Gold's Red Skipper was also sore when he was entered in the Tennessee Walking Horse National Celebration since "entering" is a continuing process which includes inspections at the time of the horse's exhibition. *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 344 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993). I accordingly find Kathy Graves violated section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)) by exhibiting Gold's Red Skipper when she rode him at the Tennessee Walking Horse National Celebration.

Jerry W. Graves and Kathy Graves contend that they did not violate the Horse Protection Act when they allowed Wallace Brandon to enter Gold's Red Skipper in the Tennessee Walking Horse National Celebration because they did not know Gold's Red Skipper was sore when he was entered and they had instructed Wallace

Brandon not to sore Gold's Red Skipper. They contend their statements that they had not given any instructions to Wallace Brandon were coerced by Animal and Plant Health Inspection Service inspector Michael Nottingham. (Respondents' Post-Hearing Brief at 4-10.)

Michael Nottingham had gone to the Graves' home on January 21, 1998, to obtain their statements. He met with Jerry W. Graves who said he could not read and he wanted to wait until his wife returned home before giving a statement. Jerry W. Graves said Michael Nottingham told him that if he gave a statement "it would just be over with. I mean, if we didn't, he told me that we was going to have big trouble." (Tr. 147.) But Jerry W. Graves also said that his opinion of Michael Nottingham was that he was "really a nice guy. I mean, he really has a good personality." (Tr. 147.) When Kathy Graves returned home, she gave a statement to Michael Nottingham and read her husband's statement. However, she was reluctant to sign. She said Michael Nottingham told her that the statements were only a formality, but that, if they did not cooperate, it was going to be "rough" and "hard" on them, and that they would be a "whole lot better off" if they signed. Like her husband, she said she thought that Michael Nottingham was "real nice." (Tr. 93-94, 135-37.) Finally, after being encouraged by her husband, Kathy Graves signed the statement (Tr. 95).

It is not likely that a person who allegedly coerces others would be considered "nice" by those he allegedly coerced. Michael Nottingham may have urged Jerry W. Graves and Kathy Graves to sign their statements, but I do not find that they were threatened or coerced by Michael Nottingham into giving false information. The many inconsistencies in the Graves' testimony also affect the credibility of their claim that they had instructed Wallace Brandon not to sore Gold's Red Skipper. The Graves said they did not know until they gave statements in January 1998 that Gold's Red Skipper was found sore when inspected at the Tennessee Walking Horse National Celebration. (Tr. 93-94, 162.) However, the Graves both indicated, when they gave their statements, that they knew that Gold's Red Skipper had been found sore by offering excuses for Gold's Red Skipper's reactions to the inspections at the Tennessee Walking Horse National Celebration, such as that Gold's Red Skipper was a "silly" horse that did not like to stand around (CX 12 at 2, CX 13 at 2). The Graves would also have been alerted to Gold's Red Skipper's "problem" in November 1997 when Wallace Brandon was notified that the ribbon and prize money for Gold's Red Skipper's third place finish, which the Graves presumably received as the owners of the horse, had to be returned because Gold's Red Skipper had been disqualified (CX 14 at 1). Another inconsistency was the statement by Kathy Graves that Gold's Red Skipper was sold in March 1998, yet the Graves exhibited him 3 months later at the Crossroads of Dixie Horse Show (Tr. 121-24; CX 8 at 1). The Graves further claimed they told Wallace Brandon that they would "move" Gold's Red Skipper if he was sore, but they continued to use Wallace Brandon as the trainer until at least June 1998, which was well after the

time they said they became aware that Gold's Red Skipper had been found sore (Tr. 93-94, 108, 162, 165; CX 8 at 1). Finally, the Graves failed to call Wallace Brandon or any of their other trainers to corroborate their claim that they had instructed Wallace Brandon and the other trainers not to sore their horses (Tr. 163-64). In these circumstances, I do not credit the testimony of Jerry W. Graves and Kathy Graves that they had instructed Wallace Brandon not to sore Gold's Red Skipper.

Findings of Fact

1. Respondent Jerry W. Graves is an individual whose mailing address is 1220 Paul Rescer Road, Moss, Tennessee 38575. At all times material to this proceeding, Respondent Jerry W. Graves was an owner of Gold's Red Skipper. On or about August 28, 1997, Respondent Jerry W. Graves allowed the entry and exhibition of Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

2. Respondent Kathy Graves is an individual whose mailing address is 1220 Paul Rescer Road, Moss, Tennessee 38575. At all times material to this proceeding, Respondent Kathy Graves was an owner of Gold's Red Skipper. On or about August 28, 1997, Respondent Kathy Graves allowed the entry of Gold's Red Skipper and exhibited Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

3. Gold's Red Skipper manifested abnormal sensitivity in both front pasterns when an Animal and Plant Health Inspection Service veterinarian examined him on August 28, 1997.

4. Gold's Red Skipper could reasonably be expected to have suffered pain in the pastern areas of his front feet when he was exhibited as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration on August 28, 1997.

Conclusions of Law

1. On August 28, 1997, Respondent Jerry W. Graves allowed the entry and exhibition of Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

2. On August 28, 1997, Respondent Kathy Graves allowed the entry of and exhibited Gold's Red Skipper as entry number 904 in class number 126 at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(A) and (D) of the Horse

Protection Act (15 U.S.C. § 1824(2)(A), (D)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Jerry W. Graves and Kathy Graves raise four issues in Respondents' Appeal of Decision and Order; and Memorandum of Points and Authorities in Support of Respondents' Appeal [hereinafter Appeal Petition].

I. The Chief ALJ Properly Received Complainant's Exhibit 8 in Evidence

Jerry W. Graves and Kathy Graves contend the Chief ALJ erred by admitting CX 8 into evidence. Specifically, Jerry W. Graves and Kathy Graves contend that CX 8, an excerpt from the *Walking Horse Report*, a trade newspaper that reports on horse shows and horse events involving primarily Tennessee Walking Horses, is not the sort of evidence upon which responsible persons are accustomed to rely. (Appeal Pet. at 2-3.)

The Administrative Procedure Act provides for the reception of evidence, as follows:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

(d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides for the exclusion of evidence, as follows:

§ 1.141 Procedure for hearing.

(h) *Evidence—(1) In general.* . . .

. . . .

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Trade publications are not inherently unreliable. Courts have frequently received trade publications in evidence.³ Moreover, at least one court has found the *Walking Horse Report* reliable.⁴

Dr. Robert A. Willems, the horse protection coordinator for the United States Department of Agriculture, testified that he has found the *Walking Horse Report* to be reasonably accurate and that in his official capacity he occasionally relies on the *Walking Horse Report*. Moreover, Dr. Willems authenticated CX 8 as an excerpt from the *Walking Horse Report*. (Tr. 169-71, 180-83.)

Jerry W. Graves and Kathy Graves, citing page 175 lines 23-25 and page 176 line 4 of the transcript, state that on cross-examination Dr. Willems admitted he did not know how accurate the horse show results reported in the *Walking Horse Report* were (Appeal Pet. 2). In response to a question regarding an entry in the *Walking Horse Report*, Dr. Willems testified, “I don’t know how accurate it is.” (Tr. 176.) However, Dr. Willems’ testimony that he did not have personal knowledge of the accuracy of an entry in the *Walking Horse Report* neither negates Dr. Willems’ testimony that he has found the *Walking Horse Report* to be reasonably accurate nor requires the exclusion of the excerpt from the *Walking Horse Report*. Therefore, I do not find the Chief ALJ erred by receiving the excerpt of the *Walking Horse Report* in evidence merely because Dr. Willems did not have personal knowledge of the accuracy of an entry in the *Walking Horse Report*.

Jerry W. Graves and Kathy Graves also contend the *Walking Horse Report* must be excluded because Dr. Willems did not testify that the *Walking Horse Report* is “of the sort upon which responsible persons are accustomed to rely.” (Appeal Pet. at 2-3.)

³See, e.g., *Berner Int’l Corp. v. Mars Sales Co.*, 987 F.2d 975, 983 (3d Cir. 1993) (stating trade journals may be helpful in Lanham Act cases); *Anheuser-Busch Inc. v. Stroh Brewery Co.*, 750 F.2d 631, 634 n.2 (8th Cir. 1984) (stating trade journal articles bolstered other evidence that the plaintiff anticipated consumer connection between the letters “LA” and low, less, or light alcohol); *Dan Robbins & Associates, Inc. v. Questor Corp.*, 599 F.2d 1009, 1014 (C.C.P.A. 1979) (stating listings in trade journals are useful evidence regarding whether the relevant purchasing public views a term as a common description); *First Nat’l Bank of Chicago v. Jefferson Mortgage Co.*, 576 F.2d 479, 495 (3d Cir. 1978) (stating the trial court did not err in receiving in evidence a trade publication for the limited purpose of showing trends in market prices of securities); *Robey v. Sun Record Co.*, 242 F.2d 684, 689 (5th Cir.) (stating the receipt in evidence of trade journals for the limited purpose of showing that the record of “Little Junior” had a degree of public acceptance was proper), *cert. denied*, 355 U.S. 816 (1957); *Wolcher v. United States*, 200 F.2d 493, 498 (9th Cir. 1952) (stating it is generally held that the state of the market in securities or commodities may be proven by reports or quotations in newspapers and trade journals); *Magna Oil & Refining Co. v. White Star Refining Co.*, 280 F. 52, 59 (3d Cir. 1922) (stating that when determining market value, you are not restricted to the evidence of actual sales, but you are at liberty to consider accredited price current lists and market reports published in trade journals which have been admitted into evidence, if you believe from the evidence the trade journal is trustworthy).

⁴See *Roberts v. Carvin*, Civ. A. No. 86-0644, 1986 WL 14184 (E.D. La. Dec. 9, 1986).

I agree with Jerry W. Graves and Kathy Graves that Dr. Willems did not testify that the *Walking Horse Report* is the sort of evidence upon which responsible persons are accustomed to rely. However, Dr. Willems testified that he has found the *Walking Horse Report* to be reasonably accurate and that, in his capacity as horse protection coordinator for the United States Department of Agriculture, he occasionally relies on the *Walking Horse Report* (Tr. 169-71). Dr. Willems' testimony regarding his view of the accuracy of the *Walking Horse Report* and his reliance on the *Walking Horse Report* in his official capacity is a sufficient basis for the Chief ALJ's receipt in evidence of CX 8. I do not find that the Chief ALJ erred by receiving CX 8 in evidence without testimony by Dr. Willems that CX 8 is the sort of evidence upon which responsible persons are accustomed to rely. Moreover, had Dr. Willems testified that CX 8 is the sort of evidence upon which responsible persons are accustomed to rely, I would have viewed this testimony as consisting of a legal conclusion interfering with the role of the Chief ALJ who, at that stage of the proceeding, was the sole arbiter of law.

II. The Chief ALJ Properly Concluded The Graves Violated 15 U.S.C. § 1824(2)(D)

Jerry W. Graves and Kathy Graves contend the Chief ALJ's conclusion that they allowed the entry and exhibition of Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), is error (Appeal Pet. at 3-8).

A. The Disposition of This Proceeding as to Kathy Graves

As an initial matter, even if I were to conclude that Kathy Graves did not allow the entry or exhibition of Gold's Red Skipper at the Tennessee Walking Horse National Celebration, that conclusion would not change the disposition of this proceeding as to Kathy Graves. I conclude Kathy Graves not only allowed the entry of Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), but also exhibited Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)). Kathy Graves' violation of 15 U.S.C. § 1824(2)(A) amply supports the \$2,000 civil penalty which I assess against her. Moreover, the 1-year disqualification from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction, which I impose against Kathy Graves, is the minimum period of disqualification

permitted by the Horse Protection Act for the first violation of 15 U.S.C. § 1824.

B. The Graves Admit That They Violated 15 U.S.C. § 1824(2)(D)

In the Appeal Petition, Jerry W. Graves and Kathy Graves state they do not contest the finding by the Chief ALJ that Gold's Red Skipper exhibited abnormal sensitivity in both front feet on August 28, 1997, but they contend they did not allow the entry or exhibition of Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee (Appeal Pet. at 3). However, in the Answer, Jerry W. Graves and Kathy Graves admit they allowed the entry and exhibition of Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee (Answer ¶ I(B), (C)). Further, Kathy Graves testified that she told Wallace Brandon that he could enter Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee (Tr. 109-10, 131). Jerry W. Graves' and Kathy Graves' admissions that they allowed Wallace Brandon to enter Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and their concession in the Appeal Petition that they do not contest the finding that Gold's Red Skipper exhibited abnormal sensitivity in both front feet constitute an admission that they allowed the entry and exhibition of Gold's Red Skipper at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Gold's Red Skipper was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Therefore, based on Jerry W. Graves' and Kathy Graves' admissions alone, I reject Jerry W. Graves' and Kathy Graves' contention that the Chief ALJ's conclusions that they violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), are error.

C. The Graves Meet Neither the *Baird* Test Nor the *Burton* Test

Jerry W. Graves and Kathy Graves, relying on *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (6th Cir. 1994), state an owner cannot be held to have allowed a sore horse to be entered or exhibited when the following three factors are shown to exist: (1) there is a finding that the owner had no knowledge that the horse was in a sore condition; (2) there is a finding that a Designated Qualified Person examined and approved the horse before the horse entered the ring; and (3) there is uncontradicted testimony that the owner had directed the trainer not to show a sore horse. Jerry W. Graves and Kathy Graves contend they had no knowledge that Gold's Red Skipper was sore, a Designated Qualified Person examined and approved Gold's Red Skipper before he was exhibited at the Tennessee Walking Horse National Celebration, and they testified unequivocally that they directed Wallace Brandon not to show Gold's Red Skipper. (Appeal Pet. at 3-8.)

Complainant correctly points out that Jerry W. Graves and Kathy Graves

misstate the test adopted in *Baird* to determine whether an owner has allowed the entry of the owner's horse while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Instead, Jerry W. Graves and Kathy Graves appear to rely on the test adopted by the United States Court of Appeals for the Eighth Circuit in *Burton v. United States Dep't of Agric.*, 683 F.2d 280 (8th Cir. 1982), in which the Court held, as follows:

. . . [W]e hold that the owner cannot be held to have "allowed" a "sore" horse to be shown [in violation of 15 U.S.C. § 1824(2)(D)] when the following three factors are shown to exist: (1) there is a finding that the owner had no knowledge that the horse was in a "sore" condition, (2) there is a finding that a Designated Qualified Person examined and approved the horse before entering the ring, and (3) there was uncontradicted testimony that the owner had directed the trainer not to show a "sore" horse. All of these factors taken together are sufficient to excuse an owner from liability.

Burton v. United States Dep't of Agric., 683 F.2d at 283.

The United States Court of Appeals for the Sixth Circuit did not adopt the test in *Burton* but states that *Burton* provides guidance, as follows:

Although we agree with the conclusion that § 1824(2)(D) does not establish a strict liability standard, we do not read the three-pronged analysis set forth in *Burton* as constituting a hard-and-fast test to determine whether an owner has violated the provision. Instead, *Burton*, in our view, provides guidance for courts reviewing cases like the one at bar, and it does so by enumerating a set of relevant factors to consider, a set that is not necessarily exhaustive.

Baird v. United States Dep't of Agric., 39 F.3d at 136-37 (footnote omitted).

The *Baird* test to determine whether an owner has allowed the entry of the owner's horse while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), is set forth, as follows:

In our view, the government must, as an initial matter, make out a prima facie case of a § 1824(2)(D) violation. It may do so by establishing (1) ownership; (2) showing, exhibition, or entry; and (3) soreness. If the government establishes a prima facie case, the owner may then offer evidence that he took an affirmative step in an effort to prevent the soring that occurred. Assuming the owner presents such evidence and the evidence is justifiably credited, it is up to the government then to prove that the

admonitions the owner directed to his trainers concerning the soring of horses constituted merely a pretext or a self-serving ruse designed to mask what is in actuality conduct violative of § 1824.

Baird v. United States Dep't of Agric., 39 F.3d at 137 (footnote omitted).

In *Baird*, the affirmative step to prevent the soring that occurred was the owner's direction to his trainers that his horses were not to be sored and his warning that he would take the horses away from trainers he suspected of soring his horses. The Court in *Baird* held that the owner's testimony alone, absent evidence to refute it, was sufficient to show that the owner did not "allow" his trainers to enter and exhibit his horses while sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). *Baird v. United States Dep't of Agric.*, 39 F.3d at 138.

The Chief ALJ did not find credible Jerry W. Graves' and Kathy Graves' testimony that they took "affirmative steps" to prevent the soring of Gold's Red Skipper. Specifically, the Chief ALJ did not credit the testimony of Jerry W. Graves and Kathy Graves that they instructed Wallace Brandon not to sore Gold's Red Skipper. Instead, the Chief ALJ credited Complainant's documentary evidence (Jerry W. Graves' and Kathy Graves' affidavits), in which Jerry W. Graves and Kathy Graves state that they gave no instructions to Wallace Brandon regarding the training of Gold's Red Skipper (CX 12 at 2, CX 13 at 2). Jerry W. Graves' and Kathy Graves' affidavits are corroborated by Wallace Brandon's affidavit in which he states, "I prepared [Gold's Red Skipper] for showing and chose all training devices and methods used during training." (CX 10 at 2.)

In *Baird*, the Sixth Circuit found that "[t]he government did not offer evidence to contradict [the owner's] testimony [footnote omitted] and, accordingly, failed to establish pretext." 39 F.3d at 138. In contrast, the evidence to contradict Jerry W. Graves' and Kathy Graves' testimony is found in the affidavits given by Jerry W. Graves, Kathy Graves, and Wallace Brandon.

The Chief ALJ further found that the many inconsistencies in Jerry W. Graves' and Kathy Graves' testimony also affect the credibility of their claim that they had instructed Wallace Brandon not to sore Gold's Red Skipper. The Chief ALJ fully discussed those inconsistencies in the Initial Decision and Order (Initial Decision and Order at 8-10). I agree with the Chief ALJ's discussion regarding Jerry W. Graves' and Kathy Graves' inconsistencies, and I agree with the Chief ALJ's credibility determinations which are based on those inconsistencies.

Further still, as an additional basis for his credibility determinations, the Chief ALJ cited Jerry W. Graves' and Kathy Graves' failure to call Wallace Brandon or any of their other trainers to corroborate their testimony that they instructed Wallace Brandon and their other trainers not to sore their horses and to refute their affidavits in which they state that they gave Wallace Brandon no instructions regarding Gold's

Red Skipper's training (Initial Decision and Order at 9-10). A party's failure to produce a witness, when it would be natural for that party to produce that witness, if the facts known by the witness had been favorable, serves to indicate, as a natural inference, that the party fears to produce the witness. This fear is some evidence that the witness, if produced, would have exposed facts unfavorable to the party. This principle has been followed in many proceedings before the United States Department of Agriculture⁵ and in many judicial proceedings.⁶ "It is certainly a

⁵*In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Terry Horton*, 50 Agric. Dec. 430, 450 (1991); *In re Modesto Mendicoa*, 48 Agric. Dec. 409, 420-22 (1989); *In re Great American Veal, Inc.*, 48 Agric. Dec. 183, 224-25 (1989), *aff'd*, 891 F.2d 281 (3d Cir. 1989) (unpublished); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1611, 1612-13 (1988) (Order Denying Pet. for Recons.); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. 1216, 1229-30 (1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995, 1018-19 (1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234, 255-56 (1986); *In re James Grady*, 45 Agric. Dec. 66, 108-09 (1986); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886, 1909-10 (1985); *In re George W. Saylor, Jr.*, 44 Agric. Dec. 2238, 2487-89 (1985) (Decision on Remand); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 256 n.4 (1985); *In re Dr. Duane O. Petty*, 43 Agric. Dec. 1406, 1425-28 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. 1505, 1509-10 (1983); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125 (7th Cir. 1983); *In re Eldon Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Dr. John Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Zelma Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir.) (2-1 decision), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re C. D. Burrus*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Eric Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Ludwig Casca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re J. A. Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

⁶*United States v. Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939); *Kirby v. Tallmadge*, 160 U.S. 379, 383 (1896); *Bufco Corp. v. NLRB*, 147 F.3d 964, 971 (D.C. Cir. 1998); *Underwriters Laboratories, Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998); *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1552 (10th Cir. 1996); *Borror v. Herz*, 666 F.2d 569, 573-74 (C.C.P.A. 1981); *Karavos Compania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 9-10 (2d Cir. 1978); *Blow v. Compagnie Maritime Belge (Lloyd Royal) S.A.*, 395 F.2d 74,

maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted.” Lord Mansfield in *Blatch v. Archer*, Cowp. 66, quoted with approval in Wigmore, EVIDENCE § 285 (3d ed. 1940).

Jerry W. Graves and Kathy Graves also claimed they visited Gold’s Red Skipper in an effort to prevent soring. Although Jerry W. Graves testified that he visited Wallace Brandon’s stable three times before the Tennessee Walking Horse National Celebration and once after the Tennessee Walking Horse National Celebration, he testified that he never checked Gold’s Red Skipper’s feet (Tr. 165-67). Kathy Graves testified that the “number one” step she took to see that her horse “was being treated humanely and not being mistreated” was to go to Wallace Brandon’s barn 3 or 4 times a month and ride the horse (Tr. 109). Kathy Graves described her pre-show examination of Gold’s Red Skipper as designed to ensure that he was not dirty; it was not designed to ensure that Gold’s Red Skipper had not been sored (Tr. 116). Further, Kathy Graves’ description of Wallace Brandon’s and her routine just prior to a show and at a show (Tr. 98-99) indicates a lack of interest in determining whether Gold’s Red Skipper had been sored. Nothing in Jerry W. Graves’ or Kathy Graves’ testimony regarding their claims that they scrutinized Wallace Brandon’s training of Gold’s Red Skipper indicates that either Jerry W. Graves or Kathy Graves took affirmative steps to prevent the soring of Gold’s Red Skipper.

Kathy Graves also testified that she had several veterinarians who would check Gold’s Red Skipper from time to time to ensure that Wallace Brandon was not soring him or being mean to him. Kathy Graves testified that the veterinarians would send her statements noting that Gold’s Red Skipper “checked fine,” had no problems, and was not sore. (Tr. 109, 120-21.) None of these veterinarians testified at the hearing. Further, Jerry W. Graves and Kathy Graves failed to introduce invoices, cancelled checks, or reports from the veterinarians to corroborate Kathy Graves’ testimony.

I have carefully considered the entire record, and I agree with the Chief ALJ’s credibility determinations. Jerry W. Graves and Kathy Graves failed to introduce credible evidence that they took affirmative steps to prevent the soring of Gold’s Red Skipper. Thus, Jerry W. Graves and Kathy Graves did not meet the *Baird* test, which requires credible evidence of an “affirmative step” designed to prevent the

79 (4th Cir. 1968); *Milbank Mut. Ins. Co. v. Wentz*, 352 F.2d 592, 597 (8th Cir. 1965); *Cromling v. Pittsburgh & Lake Erie R.R.*, 327 F.2d 142, 148-49 (3d Cir. 1963); *Hoffman v. Commissioner*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. v. Staples*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhoefer v. Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Pacific-Atlantic S.S. Co. v. United States*, 175 F.2d 632, 636 (4th Cir.), *cert. denied*, 338 U.S. 868 (1949); *Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38, 42-43 (8th Cir. 1946); *Bowles v. Lentin*, 151 F.2d 615, 619 (7th Cir. 1945), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Ratcliff*, 108 F.2d 253, 256-57 (C.C.P.A. 1939).

soring that occurred. Further, Jerry W. Graves and Kathy Graves failed to meet the third prong of the *Burton* test, viz., uncontroverted testimony that the owner had directed the trainer not to show a sore horse.

III. The Record Supports the Chief ALJ's Credibility Determinations

Jerry W. Graves and Kathy Graves contend the Chief ALJ's finding that they lacked credibility is error (Appeal Pet. at 8-12).

The Chief ALJ found Jerry W. Graves' and Kathy Graves' testimony that their affidavits (CX 12, CX 13) were coerced by Michael K. Nottingham and that they instructed Wallace Brandon not to sore Gold's Red Skipper was not credible (Initial Decision and Order at 8-9).

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).⁷ The Administrative Procedure Act provides

⁷See also *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1053-54 (1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (*per curiam*) (stating that while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating the Commission is not strictly bound by the credibility determinations of an administrative law judge);

that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

. . . .

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT describes the authority of the agency on review of an initial or recommended decision, as follows:

Appeals and review. . . .

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 83 (1947).

Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.⁸ The Chief ALJ explained in great detail his reasons for concluding that Jerry W. Graves' and Kathy Graves' testimony was not credible (Initial Decision and Order at 8-10). The record supports the Chief ALJ's credibility determinations. Therefore, I reject Jerry W. Graves' and Kathy Graves' contention that the Chief ALJ's credibility determinations are error.

IV. The Reference to the Principle of *Respondent Superior* Is Surplusage

Jerry W. Graves and Kathy Graves contend the Chief ALJ's conclusion that they are liable for the actions of Wallace Brandon "because of the doctrine of respondent [sic] superior" is error. Jerry W. Graves and Kathy Graves state the doctrine is inapplicable because neither Jerry W. Graves nor Kathy Graves had an employer-employee relationship with Wallace Brandon (Appeal Pet. at 12).

The Chief ALJ states "[a]s Brandon was employed by the Graves to enter Skipper in a horse show, they are liable under the principle of *respondent [sic] superior* for Brandon's act in entering Skipper while sore" (Initial Decision and Order at 10 n.1). The Chief ALJ concluded that: (1) Jerry W. Graves allowed the entry and exhibition of Gold's Red Skipper at the Tennessee Walking Horse National Celebration, while Gold's Red Skipper was sore, in violation of 15 U.S.C. § 1824(2)(D); (2) Kathy Graves allowed the entry of Gold's Red Skipper at the Tennessee Walking Horse National Celebration, while Gold's Red Skipper was sore, in violation of 15 U.S.C. § 1824(2)(D); and (3) Kathy Graves exhibited Gold's Red Skipper at the Tennessee Walking Horse National Celebration, while Gold's Red Skipper was sore, in violation of 15 U.S.C. § 1824(2)(A) (Initial Decision and Order at 11). However, the Chief ALJ did not conclude that Jerry W. Graves or Kathy Graves entered Gold's Red Skipper at the Tennessee Walking Horse

⁸*In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, No. 00-3173, 2001 WL 401594 (10th Cir. Apr. 20, 2001) (unpublished); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

National Celebration. Therefore, I find the Chief ALJ's statement that Jerry W. Graves and Kathy Graves are liable, under the doctrine of *respondeat superior*, for Wallace Brandon's act of entering Gold's Red Skipper at the Tennessee Walking Horse National Celebration is surplusage. Accordingly, I do not include the Chief ALJ's statement regarding Jerry W. Graves' and Kathy Graves' liability under the doctrine of *respondeat superior* in this Decision and Order. I do not address whether the Chief ALJ's statement regarding Jerry W. Graves' and Kathy Graves' liability under the doctrine of *respondeat superior* is error.

For the foregoing reasons, the following Order should be issued.

ORDER

Paragraph I

A. Jerry W. Graves is assessed a \$2,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Jerry W. Graves' payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Jerry W. Graves. Jerry W. Graves shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 98-0011.

B. Jerry W. Graves is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Jerry W. Graves shall become effective on the 60th day after service of this Order on Jerry W. Graves.

C. Jerry W. Graves has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Jerry W. Graves must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. 15 U.S.C. § 1825(b)(2), (c). The date of this Order is July 19, 2001.

Paragraph II

A. Kathy Graves is assessed a \$2,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Kathy Graves' payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Kathy Graves. Kathy Graves shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 98-0011.

B. Kathy Graves is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Kathy Graves shall become effective on the 60th day after service of this Order on Kathy Graves.

C. Kathy Graves has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which she resides or has her place of business or in the United States Court of Appeals for the District of Columbia Circuit. Kathy Graves must file a notice of appeal in such court within 30 days

from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. 15 U.S.C. § 1825(b)(2), (c). The date of this Order is July 19, 2001.
